

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v

Gill Design Inc.

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid commissions/ wages

Employer: Gill Design Inc, 3 Industrial Dr. Unit 5, Windham, NH 03087

Date of Hearing: October 27, 2015

Case No.: 51404

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$2,781.00 in unpaid commissions for sales she made.

The employer denies the claimant is due any further commissions. They notified the claimant on April 3, 2015, that as of April 6, 2015, she would be moved from her sales position to a manufacturing position. They advised her that she would receive commissions on any orders which invoiced and shipped prior to April 6, 2015. They paid her an additional \$464.10 on PO 21420 pursuant to that notification.

The hearing was left open until November 4, 2015, for the employer to submit a redacted copy of their timely exhibits. The redacted copies were received within the required timeframe.

FINDINGS OF FACT

The claimant worked for the employer from 2009/2010 until April 14, 2015, when the employer terminated her employment.

In 2012, she moved into a sales position. Pursuant to a conversation with Michael Gill, she would receive a 7% commission on ARC sales if they were to secure ARC as a customer. The employer stated she would receive commissions when she generated a quote, the customer obtained a PO number, the employer manufactured the item, the item shipped, the customer had been invoiced, and the employer received payment.

The employer failed to memorialize the commission policy in writing.

The claimant argues she is due 7% on all sales she made.

The employer argues they notified her commissions would cease as of April 6, 2015, if the product had not invoiced and shipped as of that date.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (c) Pursuant to RSA 275:49, every employer shall inform his/her employees in writing of any change to such employees rate of pay, salary or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer made a verbal statement regarding the timing of the payment of commission on sales made by the claimant to ARC.

The employer failed to properly notify the claimant of the commission policy as required by RSA 275:49 and Lab 803.03 (a) and (c). At no time did they discuss with the claimant how the commissions would be treated should she leave her position in sales.

The employer's argument that they are a small company is not persuasive as it does not absolve them of the requirement to notify employees in writing of their rate of pay and commission structure.

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his commission when the order it is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly (*emphasis in original*) demonstrates a different compensation scheme".

The Hearing Officer finds that the employer failed to alter the general rule by written agreement or otherwise prior to the commissions being earned. The employer attempted to change the commission policy after the orders had been accepted and the commission had been earned. Because they failed to alter the general rule in a timely manner, the claimant proves by a preponderance of the evidence that she is owed the remainder of the commissions on the outstanding sales made prior to her demotion and termination.

The claimant calculated commissions due of \$2,781.00.

The claimant submitted the following documentation for commissions earned:

PO	21420	2/11/2015	\$11,960.00	x	7.00%	=	\$837.20
PO	21555	2/24/2015	\$6,240.00	x	7.00%	=	\$436.80
PO	21764	3/17/2015	\$15,830.00	x	7.00%	=	\$1,108.10
PO	21895	4/1/2015	\$4,000.00	x	7.00%	=	\$280.00

The PO numbers total \$2,662.10, not \$2,781.00 as claimed. The employer made two payments totaling \$464.10, which leaves a balance due of \$2,198.00.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met her burden in this claim.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that she is owed the claimed commissions/wages, it is hereby ruled that the Wage Claim is valid in the amount of \$2,198.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$2,198.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: November 6, 2015

MJD/kdc